Concealment, Misrepresentation, Fraud or False Swearing

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BY

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Concealment, Misrepresentation, Fraud or False Swearing

Mr. President and Gentlemen of the Insurance Society:

With respect to Concealment, Misrepresentation, Fraud or False Swearing, the Standard Policy provides:

> "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Concealment is defined generally in Bouvier's Law Dictionary as:

> "the improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known."

The general definition contained in the New Standard Dictionary as:

> "the injurious and intentional suppression or non-disclosure by a party to a contract (as of insurance) of facts that he was bound to know and reveal."

is, in fact, more nearly a definition of concealment in fire insurance. Neither of these definitions recognizes the distinction between concealment in marine insurance and concealment in fire insurance, a distinction embodying the vital element of intent.

Duer in his work on insurance, (Lect. XIII., P. I. Sec. 3), says of concealment in marine insurance:

> "It is not necessary, in order to avoid the policy, that the misrepresentation or concealment of material facts, shall appear to have been intentional and fraudulent. Whether it resulted from design, or from ignorance, mistake or inadvertence, the effect is the same."

But with respect to concealment in fire insurance, long before the adoption of the Standard Policy, Judge Bronson, writing for the New York Supreme Court, in BURRITT v. SARATOGA CO. MUTUAL FIRE INS. CO., said:

"In Marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what use it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance."

5 HILL 188, at 191.

May in his work on insurance, 4th Edn., Sec. 200, accordingly works out the rule that concealment in fire insurance is:

"a positive intentional omission to state what the applicant knows, or must be presumed to know, ought to be stated."

And the courts, departing from the law of marine insurance, have now generally adopted the view that the concealment of a material fact, when not made the subject of express inquiry by the insurers, must be intentional to avoid the fire policy.

Reviewing the concealment clause of the New York Standard Policy, the late Justice Bischoff of New York adopting from a text writer, (5 LAWSON'S RIGHTS, REMEDIES & PRACTICE, Sec. 2,060, P. 3,520), the following statement:

"Concealment is the wilful withholding of some facts material to the risk which the insurer had a right to know, and which the insured was under a duty to disclose' "

held, in a case where the failure to disclose a chattel mortgage was urged as a concealment avoiding the policy, that:

> "Plaintiff, and its officers and agents, cannot be said to have wilfully withheld any material fact from defendant's knowledge unless they knew, or had reason to know, that the information was required by it. There is nothing before us from which we may ascertain that the application for insurance required that the liens or incumbrances be stated, or that inquiry was at any time, before the policy was issued, made of plaintiff, its officers or agents, respecting these matters, and in the absence of every intimation that such was desired, plaintiff was under no duty to disclose the particulars of its interest in the property insured."

AM. ART. GOLD S. CO. v. GLENS FALLS INS. CO.,
1 Misc. 114.

although the court did find that the chattel mortgage constituted a breach of the warranty against the existence of a chattel mortgage which would avoid the insurance upon the property encumbered.

Vermont, borrowing from New Hampshire, (CLARK v. UNION MUTUAL INS. CO., 40 N. H. 333), defines concealment under the standard policy provision as:

> "a designed and intentional withholding of any fact material to the risk, which the insured ought in honesty and good faith to communicate."

MASCOTT v. FIRST NATIONAL F. I. CO.,
69 Vt. 116.

The general attitude of the courts toward concealment in fire insurance is expressed in the often quoted case of GATES v. MADISON COUNTY MUTUAL INS. CO., 5 N. Y. 469, where Judge Jewett, writing for our Court of Appeals, said:

> "A policy of insurance is a contract, and is to be governed by the same principles which govern other contracts. When it is said to be a contract *uberrimae fidei,* this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is supposed to be necessarily less acquainted with the details of the subject of the contract than the other. But either party may be innocently silent as to grounds open to both, to exercise their judgment upon, for in such a case the maxim, *aliud est celare, aliud tacere,* applies.
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> In marine insurance, the insured is bound, although no inquiry be made, to disclose every fact material to the risk, within his knowledge. And although the same general

principles apply to the contract of fire insurance, yet in making the latter, there being no fraud practiced, if the applicant for such insurance make a true and full answer to the questions put to him by the insurer, in respect to the subject of insurance, it is enough; he is not answerable for an omission to mention the existence of other facts, about which no inquiry is made of him, though they may turn out to be material for the insurer to know in taking the risk. He has a right to suppose that the insurer in making inquiries in respect to particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge, or waives information, of them.

And so if an insurer enter into a contract of insurance against fire, without making any inquiry of the applicant in respect to the subject of insurance, he has no ground for complaint, if the risk turn out to be greater than he anticipated, unless, indeed, the insured is chargeable with some misrepresentation in reference to the nature or extent of the risk.

Hence it has become the general practice of insurers against fire, to guard in some form against the consequence of such matters as they deem material to the risk, or which may affect the amount of premium to be paid; sometimes by conditions or proposals annexed to and made a part of the policy, and sometimes by requiring the applicant to disclose certain facts in a written application for insurance, making it a part of the contract. Experience has, as I think, shown that the provisions thus adopted have proved generally sufficiently strict and technical to insure a full and true disclosure of all such facts as insurers have thought it important to know; and where the insured has complied with such provisions, I see no ground to make him responsible, as for a concealment, by omitting to communicate to the insurer other facts and circumstances within his knowledge of ordinary occurrence, although material to the risk, unless they have been withheld with an intention to defraud, there being no condition in the policy requiring it."

An important qualification is added to the general rule by the judge who wrote for the Ohio Supreme Court this statement:

"in the absence of special provisions in the policy relating to the disclosure of facts material to the risk, all that is required of the insured is, that he shall not misrepresent or designedly conceal any such facts, and that he answer fully and in good faith, all inquiries addressed to him by the insurer * * * perhaps with the qualification * * * that the insured does not withhold information of such unusual and extraordinary circumstances of peril to the

> property, as could not, with reasonable diligence, be discovered by the insurer, or reasonably anticipated by him, as a foundation for specific inquiries."

PROTECTION INS. CO. v. HARMER,
2 Ohio St., 452, at 473.

This qualification, important to underwriters in New York who are constantly binding fire risks in remote sections of the country, was recognized in New York by the Appellate Division in the Fourth Department in the case of CLARKSON v. WESTERN ASSURANCE CO., 33 Ap. Div. 23, involving the steamer Northerner, which was engaged in traffic on the Great Lakes. In December the vessel on voyage from Buffalo to Duluth was stranded at Keweenaw Point on Lake Superior. To get her off about 2,500 barrels of kerosene oil were jettisoned and a large number of barrels of lubricating oil were broken open and poured over the side of the vessel, so that the vessel must have been saturated with oil, and the risk from fire materially increased. The vessel so lightened, but leaking badly, made a near-by harbor. The captain by wire advised the owners at Rochester, N. Y., of her situation and that she would lay up for the winter, suggesting that they should obtain their fire insurance for the winter. The owners by wire directed their broker at Buffalo to obtain the insurance, and he did so without disclosing to the underwriters the facts as to the saturation of the vessel by oil and in fact without himself knowing them. The court held that:

> "The subject of insurance was a vessel which was laid up in a harbor many hundreds of miles distant from the place where the insurance was effected. It was consequently not 'within the limits of actual inspection by the insurers or their agents.' In accepting an application for insurance under these circumstances the underwriters had a right to assume that the owners or their agent would act in perfect good faith and disclose any and all facts material to the risk of which they had any knowledge; and it seems to us that they were under precisely the same obligation to do so as they would have been had they been seeking to obtain an insurance of their vessel against the perils of water. * * * Consequently, to have concealed from them its true condition was, in our opinion, almost if not quite equivalent to an actual fraud."

and a judgment against the underwriters was reversed.

In deciding what is a "conscious," "wilful," "designed" or intentional" withholding, the courts, as is usual in the law of fire insurance, tend to favor the insured; so it has been held that a

general statement of facts, if enough to put the underwriter on guard, does not require the applicant to go into details. On Wednesday evening, Bebee, a Connecticut Yankee, discovered and extinguished fire in a barrel of shavings in his woodhouse. Thursday afternoon he discovered fire in the attic of the woodhouse and at the same time in a separate room in the attic of his dwelling house connecting. By the time he had extinguished those two fires another fire was discovered in a front chamber of the dwelling, and he extinguished that fire, making four fires of unknown and suspicious origin within twenty-four hours. Bright and early Friday morning, Bebee went to the fire insurance agent to get insured. Bebee told the agent he had had some fires and had put them out, that he was afraid of fire and wanted to know whether certain kinds of matches left about the house would ignite of themselves. He did not specify that he had had four fires on his premises within the forty-eight hours preceding the application. The agent asked if Bebee knew the origin of the fires and whether he had any enemy whom he suspected. Receiving negative answers the agent remarked that he himself carried insurance because he was afraid of fires which frequently occurred without anyone knowing how, accepted the line and hastened to collect his commission. The house burned on the Tuesday following. The Supreme Court of Connecticut, BEBEE v. HARTFORD COUNTY MUTUAL, 25 Conn., 51, held that the frequent occurrence of fires shortly before the insurance was effected was a material circumstance, the concealment of which would have avoided the policy, but that Bebee's general statement was enough to put the underwriter on his guard and was sufficient, and the insured was not required to go into details, the court saying:

> "the insured is not bound to force his knowledge upon the insurer."

If, however, the underwriter has notice that the insured has omitted to give some information which it deems material, as the omission to answer a question in the application it will not be heard, after the policy has issued and a loss has been incurred, to complain of the concealment, for the reason that the issue of the policy before it has the desired information is a waiver thereof. An illustration is found in New York in the case of PARKER v. OTSEGO CO. F. I. CO., 47 App. Div. 204, aff'd. 168 N. Y. 655, where the insurance was issued upon a written application containing the following:

"The aforesaid premises are not encumbered by mortgage, or otherwise, to exceed the sum of $———."

It did not appear whether the application was on a company form or assured's form. The court held that if assured had written the entire application it was a statement that there was an encumbrance of uncertain, unknown or unstated amount; but if the form was prepared by the underwriter and the assured left the amount blank, then the statement was merely incomplete, and obviously so to the underwriter and that there was no concealment surviving the issue of the policy.

To the same effect, see CARSON v. JERSEY CITY INS. CO., 43 N. J. L. 300; HALL v. PEOPLE'S MUTUAL, 72 Mass. 185, and ARMENIA INS. CO., v. PAUL, 91 Pa. St. 520.

The test of the materiality of any fact is not whether or not the fact has contributed to the occurrence of a loss. In point of time, the application of the test must be as of the inception of the contract, not after the loss.

A material fact is defined to be:

"one which if communicated to the underwriter would induce him either to decline the risk altogether, or not to accept it unless at a higher premium."

BOGGS v. AMERICA INS. CO.,
30 Mo. 63.

or one:

"the knowledge or ignorance of which would materially influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance."

MASCOTT v. FIRST NAT'L F. INS. CO.,
69 Vt. 116.

holding that in the absence of inquiry on the part of the insurer, failure on the part of the insured to disclose a mortgage of $200. on a building worth $2,500. was not a material concealment.

Following the Gates case, *supra,* the courts have generally held that if the underwriter fails to make any inquiry at the time the policy is issued, it must be deemed content to assume the risks of the property as they are; but if the underwriter does make inquiry, then those matters not inquired about are deemed immaterial. So the Court of Appeals in New York has said:

"The applicant has a right to suppose that the insurer, in making inquiries as to particular facts, considers all others to be immaterial, or that he assumes to know or waives information in regard to them."

BROWNING v. HOME INS. CO.,
71 N. Y. 509.

In SMITH v. HOME INS. CO., 47 Hun. 30, it appeared by the evidence that Smith made complaint against a person who was thereafter convicted of a crime. The father of the convict then threatened to "fix" Smith. Friends advised Smith to get his property insured. He did. And in due course a fire occurred. The trial court was requested and declined to charge:

> "that if the plaintiff believed, when he applied for the policy, that there was danger of an incendiary burning of his property, and did not disclose that fact in his written application, he could not recover."

The Appellate Court said:

> "It does not appear that any threat to burn the plaintiff's property or to do him any injury was made, other than that imported by the purpose expressed to fix him. This did not necessarily increase the hazard of the insurance of the plaintiff's buildings, but inasmuch as he deemed it prudent, by reason of such threat to protect himself in that manner against loss, it is said that the information that the threat to fix him was made must be deemed material to the risk. Assuming it was so, the plaintiff was not called upon by any inquiry embraced in the application to make the disclosure of it. And the application in blank was provided by the defendant's agent to be filled by answers to questions it contained, to furnish the basis of the insurance. He was not required to insert it in the application, and, therefore, the exception to the refusal to charge as requested in that respect was not well taken."

The case is complicated by testimony that assured related the circumstances to a solicitor who was claimed to be in the employ of the underwriter's agent, but the court said, however, that it did not rest its decision upon that ground, but upon the ground that it could not, as matter of law, properly hold that there was a designed concealment inasmuch as the application blank submitted by the underwriter contained no inquiry respecting incendiarism.

There is a statement in a Kentucky case, GERMAN AMERICAN INS. CO. v. NORRIS, 100 Ky. 29, containing the provisions of the standard policy, that an applicant for fire insurance on property is not bound to disclose an attempt to burn the property sought to be insured unless asked about it. In this case, as in the Smith case, *supra,* in New York, there was some evidence that the underwriters knew the facts when accepting the

insurance, and I do not consider them authorities entitled to great weight for the proposition that one may procure insurance on his property because of known threats to burn it, conceal the threats from the underwriters and after the anticipated loss collect the insurance.

It was squarely held in Louisiana that the omission to notify the underwriter of a recent attempt to burn a building next to that on which the insurance was sought—a circumstance which prompted the purchase of the insurance—avoids the insurance.

WALDEN v. LOUISIANA INS. CO.,
12 Louis. 134,
32 Am. Dec. 116.

But Arkansas has held, and we are not disposed to quarrel with the decision, that if the suspected incendiaries are dead, a negative answer to the question, "Has any threat of incendiarism been made, or have you any fear of incendiarism?" will not avoid the insurance.

ARKANSAS MUT. FIRE INS. CO. v. WOOLVERTON,
82 Ark. 476.

In the case of ORIENT INS. CO. v. PEISER, 91 Ill. App. 278, there was testimony that insured's brokers presented an application at five o'clock, P. M., for insurance, which was accepted; that a fire had broken out in the neighborhood of the insured property between 4 and 4:20 o'clock, P. M.; that the brokers knew of the fire at 4:45 o'clock but did not know that it had reached their client's property and that they did not communicate their knowledge of the circumstances to the underwriters. The court held that if there was a fire raging in the neighborhood of the building containing the insured property at the time the application was made and the applicant knew of it when he made the application and suppressed that fact, the contract of insurance could not be enforced because of fraud.

It was decided in 1914 in WOOD v. SPRING GARDEN INS. CO., 215 Fed. 355, that if an insurance agent issues a policy on his own property and does not disclose to his company the facts as to his interest and ownership, the policy is void. In Mississippi in WILDBERGER v. HARTFORD FIRE INS. CO., 72 Miss. 338, the rule was applied to a policy upon property held by the agent, not as an individual, but as receiver appointed by the courts.

Ordinarily, whether or not any fact is material is for the jury to determine. So, in PELZER v. SUN FIRE OFFICE, 36 S. C., 213, under an instruction that the insured in applying for the insurance should not withhold any fact which they knew, or had reason to believe, would be likely to influence the underwriters either in fixing the rate of premium or in rejecting the risk altogether, it was left to the jury to determine whether the concealment was material when insured failed to disclose to the underwriters the provisions of a lease releasing insured's landlord, a railroad company, from liability for any loss by reason of fire communicated from its locomotives, thereby defeating the underwriters' rights of subrogation. The jury decided that the underwriters would not have rejected the risk or raised the rate had they known of the release and their finding was sustained on appeal.

In a late case in Ohio, ENSEL v. LUMBER INS. CO., 102 N. E. 955, decided in 1913, the insurance covering insured's interest in lumber taken from an elevator purchased from a railroad for the purpose of demolition, it was held that the failure of the insured to direct the attention of the underwriters to a clause in their contract with the railroad releasing it from liability for fire caused by it did not even raise a question worthy of submission to the jury, and the trial court properly refused to submit it to the jury when the underwriter's agent could have seen the contract for the asking but did not ask.

In passing, it may be observed that these last two cases should not be confused with those cases where the insurance contract contains an express provision relieving the underwriters from liability in case of any agreement by the insured releasing his rights of recovery against third persons or corporations, for the courts have sustained the validity of those provisions and released the underwriters. See, FAYERWEATHER v. PHENIX INS. CO., 118 N. Y. 324; KENNEDY BROS. v. IOWA STATE INS. CO., 119 Iowa 29, and CARSTAIRS v. MECHANICS & T. I. CO., 18 Fed., 473.

The word representation is refined generally in Webster's International Dictionary as:

> "A statement of fact incidental or collateral to a contract, made orally or in writing or by implication, on the faith of which the contract is entered into."

Representation in insurance law is defined by the New Standard Dictionary as:

> "A statement of facts affecting the risk made by an insured person prior to the execution of the policy. Such representation, though extrinsic to the policy, is held as collateral thereto."

A misrepresentation is by those dictionaries said to be:

> "A wrong or false representation; an incorrect, unfair, or false statement."
>
> "An untrue, improper or unfaithful representation."

Bouvier's Law Dictionary, Rawle's Revision, defines representation in insurance as:

> "The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract."

The same authority says:

> "Misrepresentation is the statement made by a party that a thing is in fact in a particular way, when it is not so."

The distinction between a concealment and a misrepresentation is that the former arises out of a silence where there is a duty to speak, and the latter is an incorrect speech: concealment, at least in the modern law of fire insurance, must be conscious, wilful, designed, intentional; whereas, misrepresentation occurring either purposely or through negligence, mistake, inadvertence or oversight, will avoid the insurance, the courts holding that in either case the injury to the underwriter is the same.

The distinction between a representation and a warranty is that a warranty is a part of the contract and must be strictly complied with; whereas, a representation is but a statement incidental to the contract, precedes it, is the inducement to it and need be only substantially true. However, by lines 45 and 46 of the standard policy providing:

> "If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured."

the contents of those documents, although not endorsed upon, or annexed to, the policy, are made warranties and with respect to them our Appellate Division has said:

> "We think it well settled in this State that where, by the terms of a contract of insurance, the application is made a part of the policy, answers made to specific questions in the application are deemed warranties, and, if untrue, prevent a recovery on the policy.

"In such a case the statements contained in the application are made material by the contract."

KING v. TIOGA CO. ASSN.,
35 App. Div. 58.

holding that an answer "no," to a question in the application "Is it encumbered" and shown to be false, avoided the insurance as to the real estate encumbered, although a recovery was allowed, on the theory of the divisibility of the contract, on personal property described in a separate item of the policy.

Concealments and misrepresentations are usually said to take place at or before the issue of the policy, but they may occur at or before the making of some endorsement on the policy, at least, with respect to the new matter introduced into the contract by the endorsement. It is probable that the effect upon the entire contract of concealments or misrepresentations in connection with the procuring of endorsements will vary with the nature of the endorsements and the relation of the concealments or misrepresentations to the whole insurance.

It is doubtful whether one, procuring an endorsement which only modifies some term of the existing contract without making a new contract by increasing the risk or introducing a new party as insured, would be required to disclose facts arising subsequent to the issue of the original policy and not relating especially to the new matter introduced by the endorsement, even though concealment of such facts upon procuring new insurance would be fatal.

Representations may be affirmative or promissory; affirmative if relating to the existence of a particular state of things at the time the contract is made and becomes operative, promissory if relating to what is to happen during the life of the contract. Under the rule excluding parole evidence to vary the terms of a written instrument, proof may not be made of an oral promissory representation as it is deemed to be merged in the written contract, but May in his work on insurance, Sec. 182, fourth edition, says that it may be shown if made in bad faith with the intent to mislead and deceive and amounting to fraud. If an affirmative representation be true when made and the contract entered into, a change subsequent to the issue of the contract will not avoid the contract, unless the change amounts to a breach of some warranty contained in the policy.

In May on Insurance, Sec. 190, p. 385, 4th edn., it is said:

> "A representation is a continuous statement from the time it is made during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract, if the changes be material and to the prejudice of the insurers, or be such as might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the time the contract is entered into. And the same rule applies in case of concealment."

Citing this statement, it was held in CARLETON v. PATRON'S ANDROSCOGGIN F. I. CO., 109 Maine 79, where the applicant represented that other insurance would expire on a designated date, which was before the acceptance of the application, and thereafter and before the acceptance of the application he procured other insurance without the knowledge of the underwriter, the representation was not true at the time of the acceptance of the application, and the policy was invalid.

But a contrary view is taken in some States, as in Iowa, DAY v. HAWKEYE, 72 Iowa 597, where foreclosure proceedings were commenced between the making of the application and the issue of the policy, the court holding that the representation was true when made, that by the language of the policy the warranty contained therein applied not to the pendency but to the commencement of foreclosure proceedings after issue of the policy, and that the period between the making of the representation and the acceptance of the line was covered neither by the representation in the application nor the warranty in the policy.

To be material, the misrepresentation must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation; if it is vague or indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, it is not a material misrepresentation.

So in Maine it is held, DENNISON v. THOMASTON MUTUAL INS. CO., 20 Maine 125:

> "But opinions, if honestly entertained, and honestly communicated, are not misrepresentations, however erroneous they may prove to be."

in a case where the insured, in response to a written interrogatory as to the distance from other buildings, had said "each side of the block are small one-story wood sheds, and would not endanger the building if they should burn," although the fire actu-

ally did spread from the sheds to the building insured, but the court intimated that its ruling would be otherwise if the opinion were not uttered in good faith.

A misrepresentation of value may be merely a matter of opinion which will not avoid the insurance, but a misrepresentation of cost or amount paid is a misrepresentation of fact which will avoid the policy as in DUNHAM v. CITIZENS INS. CO., 34 Wash. 205, where assured made an oral statement in response to inquiry by the agent that he had paid $1,500 on the contract price of a building under construction, whereas, in fact he had paid only $700, and the insurance was held to be void.

Or as in CRADDOCH v. CONNECTICUT FIRE INS. CO., 160 Ky., 519, where the insured, in an application for insurance on machinery stated that it cost $1,200 and had only been in use two years, whereas it had cost only $250 and had been in use more than seven and the misrepresentation was held material and sufficient to defeat a recovery on the policy after a fire.

In contrast with the rule respecting concealments, particularly as illustrated in the Bebee case, *supra,* it was held that the insured was chargeable with misrepresentation sufficient to avoid the insurance, when, in response to the underwriter's direct interrogatories respecting danger from incendiarism, the insured, a manufacturer, talked generally with the agent about the constant danger of fire from discharged employees, but did not mention a small fire of recent occurrence which, he believed, had been set on his premises by a discharged workman. And it made no difference, the court held, that the jury believed assured's statement that when he applied for the insurance he believed the danger from the previous incendiary past.

NORTH AMERICAN FIRE INS. CO. v. THROOP,
22 Mich. 146,

the court saying:

> "it cannot be denied that an attempt to destroy by fire the property upon which insurance is sought, is usually regarded as a circumstance of very high importance, and as one that presumptively is always material to the risk. * * * No one can question its being both proper and prudent for the insurer in his application for policies to treat this circumstance as material, and to require specific and truthful answers concerning it; and when he has done so, and made their truthfulness a condition of the contract, we do not think it competent to submit to a jury the question of materiality, and allow them to find, in opposition to the

> contract of the parties and to general experience, that it was unimportant. We think a fact thus specifically inquired about, and generally of such vital importance, is to be considered material as a matter of law. * * * The plaintiff's general talk about a fear of the building being burned was precisely of that character to be well calculated to lead the agent away from any supposition that this particular building had been, or was likely to be singled out from among others in the same city for destruction; and his answer to the interrogatory in the application, if not untruthful, was at least wanting in candor and frankness, and had a tendency to mislead. When a person is particularly interrogated regarding a subject peculiarly within his own knowledge, and the other party is expected to contract with him in reliance upon his answer, and the answer is made misleading, if not untruthful, it seems to us a perversion alike of law and justice to say that he shall have the advantage of his uncandid answers if he can convince a jury, that the other party was wanting in prudence in relying upon them, because of having notice extrinsic of these answers, which was sufficient, if followed up by inquiries in other quarters, to have led him to a knowledge of the exact facts."

A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the insured himself.

ARMOUR v. TRANSATLANTIC F. I. CO.,
90 N. Y. 450.

CARPENTER v. AM. INS. CO.,
1 Story's C. C. 57.

In the Armour case, insured's agent, on applying for insurance, stated that there was $200,000 of insurance on the property, whereas, there was in fact only $30,000. Apparently the policy did not contain a co-insurance clause and the underwriter's risk on the policy was greatly enhanced because the total contributing insurance was so small in amount. Our Court of Appeals held that while the materialty of any representation is usually for the jury to determine, the risk was so much greater than it would have been had the representation as to other insurance been true that a verdict that the representation was immaterial would have been set aside.

In WELLS v. GLENS FALLS INS. CO., 117 App. Div. 346, it appeared that the husband, who managed the place for

the wife in whom title was vested, sometime prior to application for the insurance, told her of incendiary fires and named the incendiary. He presented to her an application for insurance containing the question "Have you any reason to fear incendiarism?" and a negative answer thereto, which she signed. The Appellate Division held that:

> "Whether the plaintiff had reason to fear incendiarism was a material inquiry. If she had reason for such fear she had falsely answered an important question, had given the defendant inaccurate information, and her policy was unenforcible."

If the application be filled out, either incorrectly or insufficiently, for the insured by the underwriter's agent with full knowledge of the facts, or if the applicant's answers to questions be set down incorrectly or insufficiently, and the application be then signed by applicant without noticing the errors, parole testimony will be admitted to prove the true statements.

PHENIX INS. CO. v. STOCKS,
149 Ill. 319.

It has been held that the policy is not avoided by a misrepresentation as to the location of property if the underwriter knows the actual facts, the courts ruling that the issuing of a void policy and retaining of a premium therefore amounts to fraud on the part of the underwriter. In LeGENDRE v. SCOTTISH U. & N. I. CO., 95 App. Div. 562, the application stated that the premises were on the south side of the road, whereas they were on the north side. Our Appellate Division in the first Department said:

> "It does not appear that the defendant made any investigation * * * and if it had investigated it would have discovered the true location of the plaintiff's residence. Had it been done within a reasonable time and there had been any basis for claiming it had been misled to its prejudice, it might have rescinded the contract and returned the premium; but having retained the premium until after the fire, it should not be heard to say that no property was insured."

Following this case the Appellate Division, in the Second Department, held, in CURNEN v. LAW, UNION AND ROCK INS. CO., 159 App. Div. 493, that a misdescription of the location of a dwelling in a fire insurance policy upon household goods, by designating it as at the northwest corner of an intersection of two streets, instead of as at the northeast corner of the intersec-

tion of the same streets, does not render the policy void, where there was no other building at the street intersection, although the company, in reliance thereon, took another risk upon the dwelling, the two combined risks exceeding the limit allowed to local agents on such lines, as the true location could have been discovered upon investigation, and the excess could have been reinsured.

The Court, Justice Harrington Putnam writing, referred to the fact that fire insurance offices have local maps which show location of property and approved the decision of the Appellate Term in the Second Department in DeNOYELLES v. DEL. INS. CO., 78 Misc. 649, where it was expressly held that the company was charged with knowledge of facts which its local agents had in the maps and cards in their offices.

An example of material misrepresentation of the nature of the risk is found in the case of EVANS v. COLUMBIA F. INS. CO., 40 Misc. 316, where the late Justice Gaynor held it a good defence to an action on a fire insurance policy purporting to insure all of plaintiff's cotton presses throughout the United States, that the plaintiff represented to the underwriter that it had only 150 such presses, whereas in fact it had 700 and that only a few of them were in couples, whereas substantially all were in couples; the court believing that the number of presses and their proximity to each other affected the risk and were material.

Fraud is a more inclusive term than the other terms under consideration in this paper. It may arise out of a concealment, or a misrepresentation, or false swearing, it may include all of them, or it may exist in some other form. It may exist at any time, either before the issue of the policy, during the term thereof, or after a loss. Fraud, whenever it is established, avoids the contract *ab initio*. It has been held that the underwriter may contest the valuation stated in a valued policy, if it is the result of fraud.

It is defined by Webster's International Dictionary as:

> "An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right; a false representation of a matter of fact (whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed) which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

> "The means by which deceit is practiced; an artifice by which the right or interest of another is injured; an injurious stratagem; a deceptive device; a trick."

The New Standard definition of fraud in law is:

> "Any artifice or deception practiced to cheat, deceive, or circumvent another to his injury."

As the purpose of a fraud is to enable an insured to collect from his underwriter a sum not due at all, or one larger than is actually due, on the policy, it is usually, but not necessarily, coupled with false swearing either in the proof of loss or the examination under oath, or both, as to assured's knowledge of the origin of the fire, or as to the quantity of personal property in his premises at the time of fire, exaggeration of value of the destroyed property, depreciation of the value of the salvage or removal and concealment thereof, his interest in the subject of insurance or the encumbrances thereon, or alterations in his books or otherwise.

It is often said, particularly in insurance litigations, that "the law abhors a forfeiture." It is also said that the penalty (forfeiture of the insurance) for false swearing bears no relation either to the benefit the insured secures or the injury which he imposes on the underwriter. So it is said that the penalty is not to fall unless the false swearing is knowingly and wilfully done; but the rule in the Federal Courts is, that if there be false swearing knowingly and wilfully done with respect to material facts, an intention to deceive the underwriter will be presumed therefrom.

In CLAFLIN v. COMMONWEALTH INS. CO., 110 U. S. 81, assured in his examination under oath swore falsely as to value and as to his ownership of the goods. He then claimed that his false swearing was not for the purpose of deceiving the underwriters, but to substantiate statements to the same effect previously made to R. G. DUN & CO. for purposes of obtaining commercial credit. The United States Supreme Court said:

> "The object of the provisions in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense

that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and wilfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. * * * The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we take to be simply this: that his motive for repeating the false statements to the insurance companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that but that he was induced to make statements, known to be false, intended to deceive the insurance companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers; and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowing and wilfully made, with the intent to deceive the defendants in error; and it is no palli-

> ation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance."

Many of the State Courts follow the Federal Courts that a presumption of intent to deceive arises from false swearing knowingly and intentionally done. So in Maine, it is said:

> "False swearing is fraud. False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement intentionally and knowingly, or fraudulently made, certainly constitutes fraud, and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent." * * *
>
> "Where a clause like the one mentioned is contained in the policy, and the insured knowingly and purposely makes a false statement on oath, concerning the subject matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not, for it is 'so nominated in the bond.'"
>
> Tinscott v. Orient Ins. Co., 88 Maine 497.

And in Oregon in WILLIS v. HORTICULTURAL F. R. of O., 137 Pac. 761, in a case where the insured had included in his proof of loss as totally destroyed articles which he himself had saved from the fire, the court said:

> "The terms 'fraud' and 'false swearing,' being used together, must have the same application, and the false swearing must have been knowingly and wilfully false; its effect being to deceive or mislead."

but that

> "false swearing knowingly and intentionally done is evidence of the fraud and of the intention to injure,"

the underwriter and that because thereof the assured

> "should lose his standing in a court of justice as to any claim under that policy."

Some States have adopted a rule expressed by the Wisconsin court thus:

> "It is not enough that it occurs through mistake, carelessness, or inadvertence, or even in unreasonable reliance on information derived from others."

So in INS. CO. v. SCALES, 101 Tenn. 628, title to insured property was in two sisters, who took no active part in the business, knew personally little of it, but left the management to their husbands. Proofs were prepared by the husbands and sworn to by both husbands and both wives, the latter making no investigation and accepting in the entirety the statement of the husbands. The court refused to hold that the women by adopting the false statements of their agents, the husbands, without investigating the facts, became themselves guilty of fraud.

The more satisfactory rule, however, was laid down in MULLIN v. VERMONT MUTUAL F. I. CO., 58 Vt. 113, where the court, recognizing that as to household effects a wife is usually much better informed than the husband, said:

> "But if the plaintiff was compelled to get the aid of his wife he assumes all responsibility for her errors as he would for his own * * * if the plaintiff adopted any false statement of the wife respecting a loss, or the value of the goods lost, without investigating the facts, he thereby became guilty of a fraud himself; and if he made representations to know the facts, when he had no knowledge, and such statements turned out to be false, it was a fraud within the meaning of the policy. He cannot even be honest by turning the matter over to his wife, and omit to inspect her inventory to see if it be correct. If he had looked it over, and wished to be honest, he would have discovered many false statements which were calculated, and probably were intended, to work a fraud upon the defendant. He could have arrested this fraud, if he had done his duty. On the contrary, he recklessly endorsed it without examination, and by so doing made it his own fraud within the meaning of the policy."

In MICK v. ROYAL EXCHANGE, 87 N. J. L. 607, New Jersey held that recovery by an honest assured on his policy would be defeated where he delegated to an agent the task of adjusting and settling a fire loss and the agent fraudulently, but without assured's knowledge, put in false bills of purchases, but on the second trial of the same case held, 87 N. J. L. 628, that, if the agent innocently transmitted to the insurer false bills procured by assured's son who was not his father's agent, the assured could recover his loss.

Decisions to the effect that false swearing by an agent will not avoid the insurance, unless the assured is responsible for it

or acquiesced therein, are predicated on the theory that authority from the insured to commit such a wrong should not be inferred.

Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the insured, or a mere mistaken expression of opinion.

> "A mere misstatement of the loss, based upon an erroneous estimate of values, which is but the expression of an opinion, does not operate to avoid the policy; the misstatement must be false and fraudulent."

CHEEVER v. SCOTTISH UNION AND N. I. CO.,
86 App. Div. 328.

As respects household furniture, the position of the courts is expressed by the Wisconsin Supreme Court as follows:

> "It is by no means certain that one can go into the market and find second-hand articles to supply those which have been destroyed, and a housekeeper is not indemnified for the loss of an efficient and useful article unless she can replace it. We do not say that this is the rule of recovery against an insurance company, but that such considerations bear upon the integrity of such a person in estimating the value of an article."

BEYER v. ST. PAUL F. & M. INS. CO.,
112 Wis. 138.

But the over valuation may be so gross as in itself to indicate fraud. So in New York it has been held to be evidence of false swearing sufficient to defeat the insurance where the assured swore that the damage was $23,000 and the jury found it to be not more than $5,000, STERNFELD v. PARK FIRE INS. CO., 50 Hun. 262, and where the assured swore in his proof of loss that the damage was $6,700 and the court found it to be only $1,800, ANIBAL v. INS. CO. OF N. A., 84 App. Div. 634.

An award of appraisers will be set aside for fraud, and it was recently held in New York in an action on the policy that the underwriter should be permitted to show that an appraisal was reached upon a false basis because of a misrepresentation by the insured of the amount of the lowest bid received for repairing the damage. STEINBERG v. BOSTON INS. CO., 144 App. Div. 110.

It has been urged that where assured's actual loss, throwing out his pretended losses, exceeded the whole amount of the policy, and that consequently the underwriter was not and could not be harmed by the false statement of additional losses, the assured should receive his actual loss, but the Supreme Judicial Court of Maine answers:

"When, therefore, he meets this demand (for a sworn proof of loss) with knowingly false statement of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy.

"The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss, taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim."

DOLLOFF v. PHOENIX INS. CO.,
82 Maine 266.

A contrary view was expressed in Mississippi in HOME INS. CO. v. LEVENTHAL, 36 Southern 1042, where the difference, however, was between the claimed value of $3,646.75 and actual cost of $3,400.

Wisconsin has ruled that:

"the law does not undertake to furnish remedies for wrongs which are so impalpable or imaginary as not to cause damage. The law does not regard or treat as a fraud a deception so intangible as not to cause damage. To amount to a legal fraud, it must both deceive and damage."

COMMERCIAL BANK v. FIREMEN'S INS. CO.,
87 Wis. 297.

The provisions of the policy under consideration, as well as the provisions of the succeeding paragraph of the policy, begin with the words "This entire policy shall be void." Before the standard policy was written, the courts decided frequently that the contract was severable and that a breach of warranty as to one item did not avoid the policy as to all the items. Mr. Kennedy, Chairman of the Committee which drafted the standard policy, in his address before this Society, stated that it was the intent of the committee in writing the words "This entire policy shall be void" to put into the contract a provision that a breach as to one of the items in the policy amounted to a forfeiture of the insurance on that one item and on all the other items. However, in the case of DONLEY v. GLENS FALLS INS. CO., 184 N. Y. 107, the Court of Appeals adhered to the old line of decisions, as respects a breach of warranty, saying:

"Whatever our views might be if the question were new, we regard it as settled that where, by the same policy, different classes of property, each separately valued, are

> insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention."

But where the assured has been found guilty of fraud in connection with the contract, the courts have refused to apply the doctrine of divisibility of the contract. As a text writer has put it:

> "Fraud as to one item forfeits the entire contract. There is no equity to induce the court to construe the contract as severable in such a case; and this was also the result at common law, without special provision in the policy."
>
> RICHARDS ON INS.
> (3rd Edn.) 316.

A case frequently cited in this connection is McGOWAN v. PEOPLES MUTUAL F. I. CO., 54 Vt. 211, where the court said:

> "The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act, condemned by public policy or the common law."

In MOORE v. VIRGINIA F. & M. INS. CO., 69 Va. 508, it appeared that insured, under a policy insuring separately a mill, machinery and stock, in his claim and proof of loss swore falsely as to the value of the stock, but not as to the buildings and machinery, and the court applying the maxim, *falsum in uno, falsum in omnibus,* denied him any recovery whatever.

In the case of HOME INS. CO. v. CONNALLY, 104 Tenn. 93, the policy, containing the standard policy clause under consideration, insured separately dwelling house and contents. Insured swore falsely as to value of contents. The court argued that the doctrine of divisibility was an equitable doctrine accepted by the courts "as one more consistent with the intention of the parties, or less likely to produce inequitable results to the insured, by affording the courts an opportunity to avoid forfeitures for innocent mistakes often made by the insured," but to permit one guilty "of fraud and false swearing" to recover would be in disregard of that fundamental maxim of equity that "he that doth inequity shall not have equity."

While New York has not squarely ruled on this point, there are intimations in SCHUSTER v. DUTCHESS COUNTY INS. CO., 102 N. Y. 260, and in the DONLEY case, *supra,* that it would follow.

Oklahoma in a case recognizing the divisibility of the policy made this limitation:

> "When the contract is not affected by any question of fraud, unlawful act condemned by public policy, or increase of the risk on account of the breach."

MILLER v. DEL. I. CO.,
14 Okla. 81.

Minnesota has stated that it will not recognize the divisibility of the contract when it is tainted with "illegality, fraud or increase of risk," PARSONS v. LANE, 97 Minn. 98, and also "that wilful, false swearing as to one article covered by the insurance policy would avoid the whole policy," HAMBERG v. ST. PAUL F. & M. INS. CO., 68 Minn. 335.

Maine most satisfactorily disposes of the question thus:

> "It is further suggested by the plaintiff, that the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud, or false swearing, is concerned."

DOLLOFF v. PHOENIX INS. CO.,
82 Maine 266.

In conclusion, it is respectfully submitted that fraud on the part of the assured, whether before or after a loss, or false swearing, should avoid the insurance as to every item of the contract, whether or not the risk be separable.

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